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February 24, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20054

Re: In the Matter of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996

Dear Mr. Caton:

Enclosed please find for filing on behalf of Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD"), an original and eleven copies of the Comments of TLD prepared in connection with the above-referenced rulemaking. Also enclosed is an additional copy of the Comments which we ask you to date stamp and return with our messenger.

Respectfully submitted,

Alfred M. Mamlet
Colleen A. Sechrest

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of **Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996**	**CC Docket No. 97-11**

COMMENTS OF TLD

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Dated: February 24, 1997

SUMMARY

In these comments, Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD") demonstrates that Section 402(b)(2)(A), which explicitly requires the Commission to "permit **any** common carrier to be exempt from the requirements of Section 214 of the Communications Act of 1934 for the extension of **any line**. . .,[1/] should not be implemented differently for international carriers than for domestic carriers. The NPRM's proposal to exclude international services from the scope of Section 402(b)(2)(A) is contrary to the plain meaning of the statute, which clearly does not distinguish between domestic and international carriers.

The NPRM's bifurcated approach also conflicts with Congress' intent, both in the 1996 Act generally and Section 402(b)(2)(A) specifically, to reduce regulation and promote competition. By retaining the requirement that carriers seek Commission approval every time they seek to extend their lines to a new country, the Commission maintains a principal market entry barrier for international carriers.

The NPRM provides no support for its proposed approach, and merely shrugs off past Supreme Court and full Commission precedents, which treat all "extensions," domestic as well as international, uniformly. However, the NPRM does suggest an alternative approach which is, in fact, consistent with this Commission precedent. Under this approach all "extensions," *i.e.*, all expansions into new territory, would no longer require prior FCC approval. TLD strongly supports such an alternative approach, which would not only be consistent with Commission precedent, but would

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1/ Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act") (emphasis supplied).

implement Section 402(b)(2)(A) in a way that is consistent with congressional intent and the plain meaning of the Statute.

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COMMENTS OF TLD

I. INTRODUCTION

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD") hereby submits comments in the above-referenced proceeding.[1/] In these comments, TLD argues that Section 402(b)(2)(A), which explicitly eliminates the need for any common carrier to seek Commission authorization for the extension of any line, should not be implemented differently in the international than in the domestic context. Such a bifurcated approach would not only be contrary to the plain meaning of the statute, but would also fly in the face of both Congressional intent and past Commission practice interpreting Section 214. The result would be an interpretation of Section 402(b)(2)(A) that is both internally inconsistent and largely meaningless.

1/ In the Matter of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, CC Docket No. 97-11 (rel. Jan. 13, 1997).

Rather, TLD supports the NPRM's alternative interpretation of Section 402(b)(2)(A),[2] which would treat all "extensions" uniformly, without distinguishing between extensions of domestic lines and extensions of international lines. Under such a definition all "extensions," *i.e.*, all expansions into new territory, would no longer require FCC approval. Such an interpretation is the only one that would implement Congress' intent, as articulated in Section 402(b)(2)(A), to eliminate the "arcane requirement that phone companies must [f]ile any line extension with the Commission."[3] Such an interpretation is also the only one consistent with past Supreme Court and Commission precedent.

II. THE COMMISSION'S INTERPRETATION OF SECTION 402(b)(2)(A) IS CONTRARY TO THE PLAIN MEANING OF THE STATUTE

Section 402(b)(2)(A) of the Telecommunications Act provides that: "[t]he Commission shall permit **any** common carrier to be exempt from the requirements of Section 214 of the Communications Act of 1934 for the extension of **any line**. . . ."[4] This section is simple and straightforward: common carriers no longer need Commission authority to extend their lines. This section makes no distinction based either on the type of common carrier at issue or the type of service provided: **all** common carriers are exempt from the need to seek Section 214 authority for **all** line extensions. Thus, once a carrier is authorized to provide a particular type of service, whether domestic or international long-distance, the Commission is required to exempt it from any additional need to seek authorization in order to extend its lines.

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[2] NPRM ¶ 35.

[3] Statement of Senator Robert Dole, 141 Cong. Rec. S7881, S7898 (June 7, 1995).

[4] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act") (emphasis supplied).

The NPRM's principal proposal, however, does not follow this clear Congressional directive. Instead, the NPRM seeks to distinguish between domestic and international carriers and confine the statutory exemption to extensions by the former but not the latter type of carrier. Specifically, the NPRM proposes to define "extension" as a "line that allows the carrier to expand its service into geographic territory **that it is eligible to serve, but that its network does not currently reach.**"[5/] Rather than exempting extensions of lines from Section 214, the NPRM contrives a definition of "extension" designed to preserve its authority. In other words, the NPRM is seeking to interject a new level of Commission scrutiny to carrier activity under Section 214 by requiring an initial Commission determination of eligibility for a Section 402(b)(2)(A) exemption.

This is a completely new regulatory concept, which the Commission explains as follows:

> Under the definition we propose, a carrier may be "eligible" to serve certain territory without any actual "authorization" to serve it. In such a case, although a carrier might need to obtain specific regulatory authorizations under the Communications Act before initiating service to given territory . . . in the domestic context, it would nevertheless be "eligible" to serve that territory for purposes of Section 402(b)(2)(A) of the 1996 Act . . . In the international context, carriers are eligible to serve only those countries for which they have received specific Section 214 authorizations. . .[6/]

In other words, a carrier that provides domestic service is already eligible to extend such service because the Commission has previously elected to forbear from regulating such service. However, a carrier that provides international service is not eligible to extend its service absent an additional Commission determination. This distinction is

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5/ NPRM ¶ 21 (emphasis supplied).

6/ NPRM ¶ 23, fn. 39.

completely artificial and irrational. The only thing it accomplishes is that it retains Commission jurisdiction over the extension of international lines, which has been the principal focus of the Commission in the administration of Section 214 in recent years.

The Commission supports its decision to treat international service differently by citing policy justifications: "[c]arrier initiation of international service raises legal, economic, policy, and facility-specific issues different from those raised by the provision of domestic service."[7/] Congress, however, has already made an unequivocal policy choice on the matter: Section 402(b)(2)(A) itself does not distinguish between domestic and international services. Again, the statute states unequivocally that the exemption applies to **"any** line" extension -- not just to a subset of extensions circumscribed by the Commission.

Furthermore, the Commission's interpretation would essentially write the exemption out of the statute: the Commission already exempts all domestic line extensions by non-dominant carriers from the Section 214 filing requirements.[8/] Thus, the Commission's proposed definition would limit Section 402(b)(2)(A)'s applicability purely to extension of domestic lines by dominant domestic carriers. Such requests amounted to only a handful of requests prior to the passage of the statute, most of which involved video dialtone services -- which Congress expressly exempted from Section 214 in a separate provision of the 1996 Act.[9/] Indeed, the NPRM itself does not cite to a single recent domestic Section 214 request that Section 402(b)(2)(A) would have made unnecessary. Thus, as interpreted by the Commission, the statute would achieve next to nothing. The Commission cannot interpret the statute so as to divest it of nearly all practical meaning.

7/ NPRM ¶ 32.

8/ 47 C.F.R. § 63.07 (1995).

9/ 47 U.S.C. § 571(c).

III. THE COMMISSION'S PROPOSED DEFINITION OF "EXTENSION" CONFLICTS WITH THE CONGRESSIONAL INTENT UNDERLYING SECTION 402(b)(2)(A)

The Commission's proposed definition of "extension" conflicts with the congressional intent underlying section 402(b)(2)(A). As the Commission itself points out, the legislative intent behind the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[10/] Section 402(b)(2)(A) implements this intent by "eliminating] the Section 214 approval requirement for extension of lines."[11/] For its part, the Commission claims that it "seek[s] to give effect to the deregulatory letter and spirit of the 1996 Act in general, and Section 402(b)(2)(A) specifically, thereby promoting competition by removing outdated barriers to entry in telecommunications markets."[12/] Clearly, the Commission's proposal does not meet either its professed goal or the mandate set forth in the 1996 Act.

The Commission's proposal deliberately limits, not extends, the pro-competitive reach of the 1996 Act. It does this by retaining what amounts to a regulatory barrier to entry into the international services market: the need to obtain FCC authorization for each and every country to which a carrier wishes to extend service. Such a requirement is precisely the type of barrier Section 402(b)(2)(A) intended to eliminate as one means of increasing competition.

10/ 110 Stat. at 56 (1996).

11/ Joint Statement of Managers, S. Conf. Rept. No. 104-230, 104th Cong., 2nd Sess. (1996), at 69; NPRM ¶ 9.

12/ NPRM ¶ 9.

IV. THE COMMISSION'S INTERPRETATION OF "EXTENSION" CONFLICTS WITH PAST SUPREME COURT AND COMMISSION PRECEDENT

The Commission's interpretation of "extension" directly conflicts with past Supreme Court and Commission precedent, which define "extension" as geographic expansion. As the Commission itself points out, Section 214 of the Communications Act was modeled after Section 1(18-22) of the Interstate Commerce Act.[13/] The Commission further points out that the Supreme Court's seminal decision of Texas & Pacific, interpreted Section 1(18-22), defining "extension" as a line "the purpose and effect [of which] is to **extend substantially the line of a carrier into new territory**."[14/]

Under Texas & Pacific, rail carriers are not eligible to provide service to the new territory unless they obtain approval for the line extension from the Interstate Commerce Commission. By contrast, if the line does not involve invasion of new territory, it is not an extension. This means the carrier is, in the Commission's parlance, "eligible" to construct it and provide the proposed service without need for prior approval.[15/] Thus, the extension into new territory, which a carrier was not hitherto "eligible" to serve, is a definitional component of "line extension." Under Texas & Pacific, extension into new territory is synonymous with past ineligibility to provide service. That ineligibility cannot be now used by the Commission to define what is **not** a line extension.[16/]

13/ NPRM ¶ 6.

14/ NPRM ¶ 11 (citing Texas & P. Ry. Co. v. Gulf, C & S.F. Ry. Co., 270 U.S. 266, 278 (1926) ("Texas & Pacific").

15/ See Texas & Pacific, 270 U.S. at 270.

16/ The Supreme Court's interpretation is compatible with the established dictionary meaning of the term "extension" as "the action of extending: state of being extended; "extend" is in turn defined as "to cause to reach (as in distance or scope)." NPRM ¶ 7; Merriam Webster's Collegiate Dictionary, Tenth Edition, at 411 (1994).

The Commission adopted this general definition in Mackay Radio, when it deemed as an "extension" an acquisition of telegraph lines to "serve 'new territory not theretofore served' by the acquiring carrier."[17/] Neither the Supreme Court nor the Commission (nor Webster's dictionary) limits this interpretation only to United States territory.

Indeed, the Commission has long followed this established interpretation of "extension," in the international as well as in the domestic contexts. In particular, the Commission has conditioned nearly 60 international Section 214 authorizations upon the following:

> [S]hould [the authorized carrier] obtain any interest in facilities beyond the authorized . . .points for the purpose of providing common carrier services, including private line services, between the U.S. and other international points, **such action would constitute an extension of line under Section 214 of the Act.**[18/]

17/ NPRM ¶ 11; Mackay Radio and Tel Co., 6 F.C.C. 562, 574 (1938).

18/ See e.g., In the Matter of BT North America, Inc., 9 FCC Rcd. 6851 (1994) (emphasis supplied). See also, In the Matter of MFS Int'l, Inc., 9 FCC Rcd. 3673 (1994); In the Matter of IAN, Inc., 9 FCC Rcd. 3671 (1994); In the Matter of GTE Telecom Inc., 9 FCC Rcd. 3356 (1994); In re Application of Intermedia Communications of Florida, Inc., 9 FCC Rcd. 3264 (1994); In re Application of Voyager Networks, Inc., 9 FCC Rcd. 2738 (1994); In the Matter of MFS Int'l, Inc., 9 FCC Rcd. 2275 (1994); In the Matter of Data General Telecomms., Inc., 9 FCC Rcd. 1724 (1994); In the Matter of LDDS Communications, Inc. 9 FCC Rcd. 1379 (1994); In the Matter of WilTel Int'l, Inc., 9 FCC Rcd. 1287 (1994); In the Matter of Pacific Gateway Exchange, Inc., 9 FCC Rcd. 1037; In the Matter of PSO, Inc., 9 FCC Rcd. 996 (1994); In the Matter of Int'l Exchange Networks, Ltd., 9 FCC Rcd. 991 (1994); In the Matter of NorLight, Inc., 8 FCC Rcd. 8768 (1993); In the Matter of Associated Communications of Los Angeles, Inc., 8 FCC Rcd. 7004 (1993); In the Matter of CICI, Inc., 8 FCC Rcd. 6715 (1993); In the Matter of Sprint Communications Co., 8 FCC Rcd. 6713 (1993); In the Matter of CICI, Inc., 8 FCC Rcd. 6717 (1993); In the Matter of MCI Telecomms. Corp., 8 FCC Rcd. 5479 (1993); In the Matter of Pacific Gateway Exchange, Inc., 8 FCC Rcd. 5237 (1993); In the Matter of Sprint Communications Co., 8 FCC Rcd. 5240 (1993); In the Matter of MFS Intelenet, Inc., 8 FCC Rcd. 5231 (1993); In the Matter of Satellite Tech. Management, Inc., 8 FCC Rcd. 5036 (1993); In the Matter of PCI Communications, Inc., 8 FCC Rcd. 4706 (1993); In the Matter of Uniplex Telecom

(continued ...)

Clearly, this condition provides a very precise definition of "extension," a definition that solidly conforms with the Commission's and the Supreme Court's understanding of that term as an expansion into new territory.

Indeed, in the international context, there is no way to provide service to new territory other than to provide service to another country. Yet the Commission attempted to disavow this interpretation in its Streamlining Order, stating: "To the extent that there are any staff level decisions discussing extension of lines that could be interpreted as inconsistent with this view, they do not represent the views of the Commission."[19] The Commission's NPRM adds little support to this position:

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[18] (... continued)

Tech., Inc., 8 FCC Rcd. 4421 (1993); In the Matter of MCI Telecomms. Corp., 8 FCC Rcd. 4314 (1993); In the Matter of Datron Sys., Inc., 8 FCC Rcd. 4218 (1993); In the Matter of CICI, Inc., 8 FCC Rcd. 3083 (1993); In the Matter of American Telephone & Telegraph Co. AT&T of Puerto Rico, Inc., 8 FCC Rcd. 2821 (1993); In the Matter of MCI Telecomms. Corp., 8 FCC Rcd. 2824 (1993); In re Application of Litel Telecomms. Corp., 8 FCC Rcd. 2525 (1993); In re Application of TRT Int'l, Inc., 8 FCC Rcd. 2523 (1993); In re Application of Cable & Wireless Communications, Inc., 8 FCC Rcd. 1664 (1993); In the Matter of Transasia Communications, Inc., 8 FCC Rcd. 1575 (1993); In the Matter of TRT/FTC Int'l Inc., 8 FCC Rcd. 1222 (1993); In the Matter of Sprint Communications Co., 8 FCC Rcd. 926 (1993); In the Matter of Sprint Communications Co., 8 FCC Rcd. 167 (1993); In the Matter of U.S. Electrodynamics, Inc., 8 FCC Rcd. 169 (1993); In the Matter of Sprint Communications Co., 7 FCC Rcd. 8580 (1992); In the Matter of MCI Telecomms. Corp., 7 FCC Rcd. 7678 (1992); In the Matter of MCI Telecomms. Corp., 7 FCC Rcd. 7634 (1992); In the Matter of MCI Telecomms. Corp., 7 FCC Rcd. 7632 (1992); In the Matter of MCI Telecomms. Corp., 7 FCC Rcd. 7131 (1992); In the Matter of MCI Telecomms. Corp., 7 FCC Rcd. 7133 (1992); In the Matter of Sprint Communications Co., 7 FCC Rcd. 6851 (1992); In the Matter of MCI Int'l Inc., 7 FCC Rcd. 6747 (1992); In the Matter of MCI Telecomms. Corp., 7 FCC Rcd. 6745 (1992); In the Matter of CICI, Inc., 7 FCC Rcd. 6629 (1992); In the Matter of Asian Am. Telecom, 7 FCC Rcd. 5266 (1992); In the Matter of Pacific Gateway Exchange, Inc., 7 FCC Rcd. 4203 (1992); In the Matter of UPS Telecomms., Inc., 7 FCC Rcd. 4205 (1992); In the Matter of Pacific Gateway Exchange, Inc., 7 FCC Rcd. 2894 (1992); In re the Application of The Bell Telephone Co., 4 FCC Rcd. 351 (1989).

[19] Streamlining Order ¶ 10. Moreover, parties had no opportunity to comment on the 1996 Telecommunications Act during the rulemaking process leading to the Streamlining Order.

> We recently indicated, however, that we would not be bound by this view and provided the following preliminary guidance with respect to the expansion of service into a new international market: "when we grant a carrier initial authority to acquire and operate facilities to a particular country, we do not grant that carrier authority for an 'extension of lines' within the meaning of Section 214. . .but instead grant that carrier authority to acquire and operate new lines to a particular geographic market."[20/]

This response is inadequate for two reasons. **First**, the Commission provides absolutely no explanation as to why nearly sixty of its Section 214 decisions in recent years would contain language that so precisely defines a key communications concept without the support of the full Commission.

Second, several full Commission decisions reflect, at least implicitly, the same interpretation of Section 214 as the International Bureau's. In particular, in In the Matter of International Record Carriers, the Commission expressly stated: "Because we are relying here upon our broad authority, under Section 214, to authorize carriers **to extend service into areas not previously served** . . . ."[21/] Similarly, in In the Matter of Western Union International, Inc., the Commission stated that the "proposed expansion beyond the traditional gateways is tantamount to a request to **extend service into an area not previously directly served**, for which a public interest finding [under Section 214] must be made."[22/] While both of these cases deal with the designation of U.S., nor foreign cities as "gateways," they nevertheless pertain to the provision of international service.

[20/] NPRM ¶ 13, (citing Streamlining the Int'l Section 214 Authorization Process and Tariff Requirements, IB Docket No. 95-188, Report and Order, 11 FCC Rcd 12884, 12888-89 (1996) ("Streamlining Order")).

[21/] 76 F.C.C. 2d 115, 135 (1980) (emphasis supplied).

[22/] 76 F.C.C. 2d 167, 183 (1980) (emphasis supplied).

Even more on point is the Commission's statement in In the Matter of American Telephone & Telegraph Co., where the Commission dealt with the request for additional capacity in an international satellite located over the Indian Ocean. In denying this request, the Commission stated: "We do not believe a grant of this authority would be consistent without responsibilities under Section 214 of the Communications Act of 1934. It would permit the carriers to **extend lines to new points not previously directly served** without first obtaining the certificate required by Section 214 from this Commission."[23/] Clearly, the Commission in this case contemplates that the expansion into new international territory represents an extension under Section 214.

In sum, the past precedent of the International Bureau and the full Commission evidences a firm understanding that the term "extension" means the same thing internationally that it does domestically: bringing an already authorized service to new territory. The novel restriction of the term proposed by the Commission would be an unreasoned departure from prior policy.[24/]

V. THE COMMISSION SHOULD ADOPT A DEFINITION OF "EXTENSION" THAT IMPLEMENTS SECTION 402(b)(2)(A) LOGICALLY

Nevertheless, the Commission does, however, suggest an alternative approach that would implement Section 402(b)(2)(A) -- and would do so logically. Specifically, the Commission suggests that it could define an "extension" as "any augmentation of lines in a carrier's network, heretofore subject to Section 214

[23/] 29 F.C.C. 2d 229, 237 (1971) (emphasis supplied).

[24/] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

certification, without distinguishing 'new lines' from 'extensions.'"[25/] Under this approach, the addition of new countries to a carrier's international routes would not be redefined as "new lines." As extensions into new territory that the carrier was not eligible to serve, they would be at the core of "line extension" as defined by Justice Brandeis in Texas & Pacific. And the Commission would not be distinguishing between different types of extension in contravention of the plain meaning of the statute, congressional intent and its own precedent.

25/ NPRM ¶ 35.

VI. CONCLUSION

For the foregoing reasons, the Commission should apply the congressional injunction to exempt all line "extensions" indiscriminately, regardless of whether the carrier planning the extension is authorized for domestic or international service.

Date: February 24, 1997

Respectfully Submitted,

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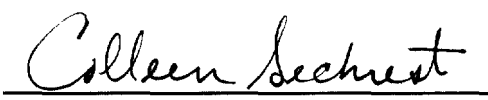

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